IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 527

EUGENE T. SINGER,

Petitioner,

against

THE YOKOHAMA SPECIE BANK, LIMITED,

Defendant,

and

ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.,

Respondent.

BRIEF IN REPLY UPON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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February 9, 1950

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Statement

Your petitioner (plaintiff below) has filed in this Court a petition to review the judgment of the New York Court of Appeals and the judgment entered thereon in the New York Supreme Court, in so far as they: (1) direct that his claim against the respondent (which such judgments adjudge to be valid) shall not be paid until a license authorizing such payment, shall have been issued under Executive Order No. 8389, and (2) disallow interest upon said claim, in the amount of $146,096.32 at the time of entry of judgment in the State Supreme Court (March 13, 1947) and

now substantially in excess of that amount, upon the ground that interest did not commence to run in the absence of such a license.

The respondent, Superintendent of Banks of New York, has filed a brief in opposition to such application. The United States, also, has filed a Memorandum as *amicus curiae*, in which (footnote 1 on pages 1 and 2) it suggests that our petition does not present a question calling for review by this Court.

Facts

The facts are fully stated in our petition, at pages 7 to 17.

Questions Presented for Review, and Grounds of Opposition

Our petition presents two points of law upon which, we contend, the decision of the Court of Appeals (in so far as adverse to petitioner) is wrong. The briefs now filed by the respondent and by the United States substantially concede the correctness of—or at very least, fail to present any substantial argument against—the points which we so raise. Those points, and the arguments directed against them, are as follows:

I. A Treasury license authorizing payment ceased to be necessary when the Alien Property Custodian assumed jurisdiction over the liquidation. The arguments in opposition are, in substance: first, that the question is no longer important because the licensing powers formerly vested in the Treasury and the Custodian are now combined in the Office of Alien Property; and second, that the State courts

have held that neither the Treasury nor the Custodian has licensed this payment. *The point that the licensing power lay with the Custodian and not with the Treasury is not controverted.* Since, as to this issue, the grounds of avoidance raised against us lie outside the matters covered in our main brief, we shall answer them in this brief.

II. The documents issued by the Treasury and by the Alien Property Custodian, authorize the payment of your petitioner's claim. Upon this point, the respondent, in substance, concedes, and the United States does not deny, *that the documents upon which we rely did authorize the payment of valid claims.* The only argument advanced is that of the respondent, who contends, in substance, that payment of the claim is not authorized: (Resp. Br., Pt. II) because the claim itself is not valid, and (Resp. Br., Pt. III) because the transaction out of which the claim arises is void for lack of a license under the Executive Order.* This, we submit, amounts to saying that if the claim is valid its payment has been licensed, since obviously, unless there is a claim it cannot be paid, and since neither the respondent nor the United States submits any substantial reason why its payment has not been licensed if it and the transactions underlying it are valid. If that is the situation it constitutes additional grounds for granting our application for certiorari, since a decision of the questions which the respondent, in his application for certiorari, has asked this Court to review—whether the claim is valid and whether the transaction

*As stated in the respondent's brief (p. 11): "Payment of *a claim based upon a transaction prohibited by the Executive Order* for reasons other than the fact that the Agency itself was a Japanese national was not authorized by these documents." (Italics ours).

underlying it is valid—will determine not only whether the claim is valid, but also whether it is payable without a further license.

POINT I.

THE QUESTIONS PRESENTED ARE OF GENERAL IMPORTANCE.

Both the respondent and the United States contend that the questions presented by our petition are not of general importance (respondent's brief, Point IV, page 12; Memorandum for the United States, footnote 1, pp. 2-3). The opposite is the fact. When the respondent applied to the Court of Appeals of New York for leave to appeal from the judgment, the United States filed a petition in that Court in support of such application.* To that petition there was annexed a letter to the Attorney General of the United States, written by the Honorable John W. Snyder, Secretary of the Treasury, in which he stated that the questions decided in this case, including specifically the question whether a Treasury license was necessary to permit payment of the judgment, were questions of paramount importance to the United States. Based upon that letter, the petition stated (page 4):

> "5. The question whether payment of the claim has been licensed also presents a question of general importance to the United States because, as stated more fully in the annexed brief, some of the documents in question contain language which was used

*The United States also filed briefs, which supported the points presented by the respondent, both in the Court of Appeals and in the Appellate Division of the Supreme Court.

> generally in documents issued by the United States Treasury Department and all of the documents in question are identical or almost identical with like documents issued in connection with numerous other bank liquidations conducted in this and other states."

Thus evidently, in the eyes of counsel for the United States, whether a question of law is or is not important depends entirely upon whether or not it was decided in their favor in the lower court.

In holding that alien enemy business enterprises in the United States and their properties, over which the Alien Property Custodian had assumed jurisdiction, were subject to dual and divided control by the Custodian and by the Treasury, the New York Court of Appeals decided a Federal question of paramount importance to all claimants. In the liquidation of such enterprises the question must inevitably and will repeatedly arise whether *payment* of claims against such institutions *has been* licensed or authorized by the proper Federal authority. That question will relate both to the right to payment without a further license and—as in this case—to the right to interest, and the date from which interest ran. In litigation involving such claims the same question will inevitably be presented for decision, and will be controlling upon the same issues. In determining that question, the fact that the Office of Alien Property now may combine the functions formerly vested in the Treasury and the Custodian will be without relevance, since the point at issue will be whether payment was licensed, and not by whom payment may hereafter be licensed. If—as we submit to be the fact—the Court of Appeals wrongly decided that question, and if its decision is followed, errors and injustices of the gravest character will necessarily result.

POINT II

THE COURT OF APPEALS DID NOT HOLD, AND THE TRIAL COURT DID NOT DETERMINE, THAT THE ALIEN PROPERTY CUSTODIAN HAD NOT LICENSED PAYMENT OF THE CLAIM IN SUIT.

The Solicitor General states (pp. 2-3) that "the Court of Appeals rightly held that neither agency [the Treasury nor the Alien Property Custodian] had licensed payment of the claim in suit". The respondent makes a similar statement (Brief, p. 3). Both statements, we believe, have in mind the decision of the Court of Appeals that the supervisory order, accompanying letter and vesting order issued by the Custodian do not authorize payment of our claim. We disagree with the decision upon that point, and have applied to this Court for a review of it (petition, pp. 4, 18; brief, p. 29).

However, the respondent and the Solicitor General advance the statements in support of their contention that the question whether jurisdiction lay with the Treasury or with the Custodian is not of substantial importance in this case.

The State courts did not rule or determine that the Alien Property Custodian has not authorized payment of this claim. The only *question of fact* (relevant to the license issue) actually litigated in the case was whether a license had been issued, or should have been issued, by the Treasury. And while the Court of Appeals ruled that the documents issued by the Custodian which were received in evidence were not licenses, it explicitly pointed out that it was not passing upon the question whether authorization for payment from the Custodian is necessary in order to permit

payment.* Nothing in its opinion can be construed as deciding the further point—essentially of fact—that he had not authorized payment by some other document, or in some other manner. Indeed, it could not have done so, for that issue was not, and is not, in the case. The judgment does not condition payment upon the production of such a license. The findings of fact and conclusions of law make no reference to such a license nor to the need for one. No such defense was pleaded by the respondent,** as would have been necessary under the State law if such a license had been relied upon as a defense (New York Civil Practice Act, § 242). No evidence was submitted upon the issue, no proposed finding of fact or conclusion of law submitted by either party refers to it (compare R. 83), and no refer-

*Thus the Court, commenting upon the Custodian's letter of September 28, 1942 (299 N. Y., at pp. 124-5), said:

> ". . . Far from constituting blanket authority to the Superintendent to pay all and sundry claims pending, the letter was an affirmation that the Custodian would thereafter reserve a veto power, even as to those claims which the Superintendent himself recognized. It is upon this ground that the United States Government presses its further point, *which we neither pass upon nor consider,* that not only a Treasury license but an authorization from the Custodian as well is necessary before plaintiff's claim may be paid." (Italics ours)

**The respondent alleged as an affirmative defense that the Alien Property Custodian had vested all funds held by the respondent in excess of funds necessary to pay preferred claims, and that petitioner's claim is not preferred (R. 15-19), but he did not allege that payment of claims could not be made without authorization from the Custodian, or that the Custodian had not authorized payment of this claim. The respondent also alleged as an affirmative defense, that a license from the *Treasury* was necessary to validate the claim, that no such Treasury license had been issued (R. 19-22), and that such a license had been refused by the Treasury (R. 24-5).

ence to it will be found anywhere in the record on appeal except only in the final opinion of the Court of Appeals.

CONCLUSION

It is respectfully submitted that the issues raised by your petitioner involve important questions of Federal law which call for the exercise of the supervisory powers of this Court, and that the petition for certiorari should be allowed.

Respectfully submitted,

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